

1 (Petition at 2, 5-6).

2 As a matter of comity, a federal court will not entertain a habeas corpus
3 petition unless the petitioner has exhausted the available state judicial remedies on
4 every ground presented in the petition. Rose v. Lundy, 455 U.S. 509, 518-22, 102
5 S.Ct. 1198, 71 L.Ed.2d 179 (1982). The habeas statute now explicitly provides that
6 a habeas petition brought by a person in state custody “shall not be granted unless
7 it appears that-- (A) the applicant has exhausted the remedies available in the courts
8 of the State; or (B)(i) there is an absence of available State corrective process; or (ii)
9 circumstances exist that render such process ineffective to protect the rights of the
10 applicant.” 28 U.S.C. § 2254(b)(1). Moreover, if the exhaustion requirement is to
11 be waived, it must be waived expressly by the State, through counsel. See 28
12 U.S.C. § 2254(b)(3).

13 Exhaustion requires that the prisoner's contentions be fairly presented to the
14 state courts, and be disposed of on the merits by the highest court of the state. See
15 James v. Borg, 24 F.3d 20, 24 (9th Cir.), cert. denied, 513 U.S. 935 (1994);
16 Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979). A claim has not been fairly
17 presented unless the prisoner has described in the state court proceedings both the
18 operative facts and the federal legal theory on which his claim is based. See Duncan
19 v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995); Picard v.
20 Connor, 404 U.S. 270, 275-78, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); Johnson v.
21 Zenon, 88 F.3d 828, 830 (9th Cir. 1996).

22 Here, petitioner has failed to allege in the Petition that the claim(s) raised in
23 the Petition was/were presented to the California Supreme Court. Indeed, petitioner
24 admits he did not present the claim(s) raised in the Petition to the California
25 Supreme Court. (See Petition at 3-4). It appears conclusively from the face of the
26 Petition that the claim(s) alleged in the Petition is/are unexhausted.

27 Accordingly, the claim(s) alleged in the Petition is/are unexhausted and the
28 Petition is properly dismissed without prejudice.

